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THE DISCRETIONARY FUNCTION EXCEPTION IN FTCA LITIGATION ALLEGING MEDICAL MALPRACTICE

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Sovereign immunity has traditionally shielded the United States government from tort liability for the negligent acts of its agents. This common law tradition ceded some ground in 1946 when Congress carved out an exception to this jurisdictional bar to suit with the advent of the Federal Tort Claims Act. Included within this statute, however, were exceptions to the government's waiver of sovereign immunity, notable among which is the discretionary function exception. This article first examines the preeminent Supreme Court cases, culminating in Gaubert, which strove to articulate the limits of this protection by defining the elusive concept of governmental discretion. The most recent pronouncement on the reach of this important liability exception has, to a considerable extent, loosed the judicial strictures which had circumscribed governmental action either by the threatened or actual imposition of tort liability. Following a brief exposition of these precedents, this article enumerates several recent lower court decisions explicating the scope of the discretionary function exception in light of Gaubert. The remainder of the article treats the implications this body of case law holds for government administrators with respect to potential medical malpractice litigation.

The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States and confers exclusive jurisdiction upon district courts over civil actions on claims for money

per Johnson

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damages for injury or loss of property, or personal injury or death, caused by negligent or wrongful acts or omissions of any employee of the government acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[1] This grant of subject matter jurisdiction is subject to the provisions of chapter 171 of 28 U.S.C. section 2680 which provides that:

The provisions of this chapter and section 1346(b) of the title shall not apply to -

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the Government, whether or not the discretion involved be abused.

Hence, the waiver of sovereign immunity created by the FTCA is circumscribed by, among other things, the extent to which any of the acts complained of are subsumed by the discretionary

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[1]28 U.S.C.A. section 1346(b).

function exception. Since its inception in 1946 there have been several Supreme Court decisions construing this exemption.

The seminal case fleshing out the discretionary function exception to imposing liability for negligence under the Federal Tort Claims Act (FTCA) is Dalehite.[2] The plaintiffs in this 1953 case sought damages from the United States for the death of Henry G. Dalehite who perished in a fertilizer explosion in Texas City, Texas. Three hundred separate personal and property claims amounting to two hundred million dollars were filed under the Federal Tort Claims Act[3]. A consolidated trial was held in the District Court for the Southern District of Texas. The crucial question was federal liability under the FTCA. The FTCA waived sovereign immunity from suit in certain cases not involving the exercise of discretion by a federal agency.[4] The plaintiffs alleged negligence on the part of virtually all the federal

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[2]Dalehite et al. v. United States, 346 U.S. 15, 73 S.Ct. 956 (1953).

[3]28 U.S.C.A. sections 1346, 2671-2678, 2680.

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officials and employees taking part in the production of the material which exploded, namely, fertilizer grade ammonium nitrate, (FGAN). FGAN's basic ingredient was ammonium nitrate, a common component in explosives. After three weeks of storage in Texas City, the fertilizer was loaded onto two steamships, one of which was also carrying a substantial amount of explosives. Both ships exploded levelling much of the city and killing many persons.

No individual acts of negligence could be shown; government liability was predicated on its participation in the manufacture and transportation of FGAN: the government was responsible for supervising, controlling, and approving work done by independent contractors with whom it had dealt. The plaintiffs attempted to limit any protection under the FTCA to the exercise of government discretion among the upper levels of the executive and legislative branches of government, thereby enabling them to prevail by attributing negligence to subordinates who implemented the mandates of those two governmental bodies.[5] The Court

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[5]The plaintiffs argued:

> This Court has always applied the theory of discretionary function only to the executive and legislative levels, and has made such function the basis of freedom from interference by the courts a personal one to the particular executive or the legislative branch. Such discretionary function may not be delegated down to subordinates and to others.
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> The negligence involved here was far removed from any Cabinet decision to provide aid to Germans and Japanese. * * * It is directed only to the mistakes of judgment

responded by declaring that discretionary function included more than

> ... the initiation of programs and activities. It also includes determinations made by executives or administrators in establish plans, specifications or schedules of operations (footnote omitted). It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[6]

Although it was never seriously disputed that cabinet-level decisions to implement the program were discretionary acts within the protection of the discretionary exception, the district court rested its liability determinations on four specific acts of negligence in the manufacture of the fertilizer, each of which was directed by the plan.[7] The Court, in essence, countered

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> and the careless oversight of Government employees who were carrying out a program of manufacturing and shipping fertilizer and who failed to concern themselves as a reasonable man should with the safety of others.

Id. at 967-68.

[6]Dalehite, supra, at 968.

[7]Id. at 969. Specifically:

> Bagging temperature was fixed. The type of bagging and the labeling thereof were also established. The PRP coating, too, was included in the specifications. The acts found to have been negligence were thus performed under the direction of a plan developed at a high level under a direct delegation of plan-making authority from the apex of the

this argument, highlighting the degree of judgment, "requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer export program . . . ."[8] The Field Director, to whom establishment of the plan had been delegated, effectuated the procedures in question after much consultation on these matters. In so doing, he employed the type of discretion protected under the Act.[9] The Court clarified that all the decisions held culpable by the district court were "all responsibly made at a planning rather than operational level and involved consideration more or less important to the practicability of the Government's fertilizer program."[10] Therefore, the judgment of the court of appeals reversing the district court was affirmed.

Two years after Dalehite, Indian Towing[11] was decided in

Executive Department.

[8]Id. at 970.

[9]For example, in fixing the bagging temperatures the Field Director consulted several authorities who offered alternative methods to those already established by the TVA which would result in greatly increased production costs and/or greatly reduced production. The Court said,

> this kind of decision is not one which the courts, under the Act, are empowered to cite as "negligence"; especially is this so in light of the contemporary knowledge of the characteristics of FGAN (footnote omitted).

Id.

[10]Id. at 971.

[11]Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122 (1955).

favor of the plaintiff, Indian Towing Company which lost its cargo when a tugboat ran aground. Indian Towing successfully alleged that the Coast Guard negligently failed to maintain a lighthouse in good operational condition. Justice Frankfurter, speaking for the majority, found that the Coast Guard was under no obligation to take over the lighthouse service. Once it made that decision engendering reliance in those who would use its services, the Coast Guard was obligated to use due care to make sure the light remained in working order. The failure to do so arose at the operational--not the planning--level thereby leaving the government subject to suit.[12]

In 1984 the Supreme Court rendered an important decision broadening the scope of the discretionary exception to include actions taken at both planning and operational stages when it held in Varig[13] that the discretionary function exception to the FTCA barred tort actions based on the Federal Aviation Administration's (FAA) alleged negligence in failing to check certain specific items in the course of certifying aircraft for use in commercial aviation. A commercial jet owned by Varig was flying from Rio de Janeiro to Paris when a fire erupted in one of its lavatories. Despite efforts to put out the fire, 135 persons perished from smoke inhalation. The Civil Aeronautics Agency

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[12]Id. at 124.

[13]U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig), 467 U.S. 797, 104 S.Ct. 2755 (1984).

(CAA), the predecessor to the FAA, certified that the aircraft's designs, plans, specifications, and performance data were in conformity with minimum safety standards. Varig brought an action against the United States under the FTCA seeking damages for the destroyed jetliner. The families or personal representatives of many of the passengers also brought claims for wrongful death. The actions were consolidated in the United States District Court for the Central District of California. The plaintiffs asserted that the CAA had been negligent in inspecting the Boeing 707 and in issuing a certificate to the aircraft when it had not complied with CAA fire protection standards.[14] The district court granted summary judgment against the plaintiffs proclaiming that the discretionary function exception barred recovery.[15]

The United States Court of Appeals for the Ninth Circuit reversed,[16] reasoning that a private individual inspecting and certifying aircraft would be liable for negligence under the California "Good Samaritan" rule. The court's principal theory in finding the discretionary function exception inapplicable was that the inspection of aircraft did not involve the type of

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[14]Id. at 2758.

[15]Id. The court also stated that the law did not recognize an actionable tort duty for inspection and certification activities; furthermore, the action was barred by the misrepresentation exception, 28 U.S.C.A. section 2680(a).

[16]692 F.2d 1205 (1982).

"policymaking discretion" contemplated by the exception.[17]

Adverting to Dalehite, the Supreme Court found that it was unnecessary and impossible "to define with precision every contour of the discretionary function exception."[18] It did, however, delineate several factors which are useful in determining whether the discretionary function exception protects governmental acts:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in Dalehite, the exception covers "[n]ot only agencies of government ... but all employees exercising discretion." [ ]
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> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[19]

The Court declared that Congress had empowered the Secretary of Transportation to establish a mechanism for enforcing

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[17]Varig, supra, at 2758.

[18]Id. at 2764.

[19]Id.

compliance with safety standards. In so doing, the Secretary's designee had devised a system of compliance review that relied upon "spot checks." The FAA's implementation of this program clearly embodied the type of discretionary activity protected by section 2680(a).[20]

In Berkovitz,[21] a minor contracted polio after ingesting an oral polio vaccine; joined with his parents, he filed suit against the United States alleging violations of federal law and policy by the Division of Biologic Standards (DBS) of the National Institutes of Health in licensing the pharmaceutical company to produce the vaccine and by the Bureau of Biologics of the Food and Drug Administration (FDA) in approving the release to the public of the lot of vaccine containing the dose which Berkovitz took. The government filed a motion to dismiss for

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[20]Id. at 2767. The Court advised:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources.

Id. at 2767-68.

[21]Berkovitz by Berkovitz, 486 U.S. 531, 108 S.Ct. 1954 (1988).

lack of subject matter jurisdiction, which motion was denied by the district court. The court of appeals reversed holding that the licensing and release of polio vaccines are wholly discretionary actions protected by the discretionary function exception.[22]

The Supreme Court restated and clarified the scope of the discretionary function exception by emphasizing that the exception "applies only to conduct that involves the permissible exercise of policy judgment."[23] The government had asserted that the exception precluded liability for any acts arising out of the regulatory programs and federal agencies.[24] The DBS had no discretion to issue a license without first receiving the required test data; consequently, it was not shielded by the discretionary function exception.[25] Agency employees who fail to follow specific directions contained in applicable regulations engage in conduct outside the discretionary function exception, as in the instant case.[26] Berkovitz alleged that, notwithstanding the policy prohibiting the release of vaccines not meeting prescribed safety standards, officials knowingly approved the release of a noncomplying lot. If those allegations

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[22]Id. at 1957.

[23]Id. at 1960.

[24]Id.

[25]Id. at 1962.

[26]Id. at 1961-62.

were correct, cautioned the Court, and if this release was not predicated on policy considerations, the discretionary function did not bar suit.[27] The Court reversed the appellate court and remanded for further proceedings in which the plaintiff would be allowed to present evidence intended to prove that the challenged conduct did not involve the permissible exercise of policy discretion.

Gaubert,[28], the most recent Supreme Court decision interpreting the discretionary function exception, arises from the alleged negligent supervision of directors and officers and the negligent involvement in daily operations by federal regulators in the savings and loan industry. Gaubert was Independent American Savings Association's (IASA) largest shareholder and chairman of the board. He brought suit after the Federal Home Loan Bank Board (FHLBB) and the Federal Home Loan Bank-Dallas (FHLB-B) undertook to oversee and advise about certain aspects of the operation of IASA pursuant to the Home Owners' Loan Act,[29] including its day-to-day business operations. At the aforementioned agencies' request, Gaubert removed himself from IASA's management and posted security for his personal guarantee that IASA's net worth would not fall below regulatory minimums. These agencies figured in the daily

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[27]Id.

[28]U.S. v. Gaubert, ___ U.S. ___, 111 S.Ct. 1267 (1991).

[29]12 U.S.C.A. section 1464(a).

operations of IASA to the extent that they recommended the hiring of consultants to advise on financial and operational matters; rendered advice on how its subsidiaries should be placed into bankruptcy; mediated salary disputes; reviewed the draft of a complaint to be used in litigation; urged IASA to convert from state to federal charter; and intervened when the state savings and loan department attempted to install a supervisory agent at IASA.[30] Ultimately, the Federal Savings and Loan Insurance Corporation (FSLIC) assumed receivership of the institution and Gaubert forfeited his security and lost all his shares in IASA.

The district court sided with the government in its contention that the regulators' actions fell within the ambit of the discretionary function exception. The court of appeals reversed in part, relying on Indian Towing[31] for upholding jurisdiction based on the supervisory role assumed by the regulators, which role did not rise to the level of policy decisions.[32] The Supreme Court found that the appellate court erred in holding that the discretionary function does not reach decisions made at the operational or management level of IASA.[33] It is the nature of the conduct not the status of the actor, which implicates the discretionary function and "[t]here is

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[30]Id. at 1269.

[31]Indian Towing Co. v. United States, supra.

[32]Id. at 1270.

[33]Id.

nothing in the description of a discretionary act that refers exclusively to policymaking or planning functions." [34] The Court explained that the actions taken were discretionary because there were no formal regulations governing the conduct in question: the statutes left it to the agencies' judgment when, how, and what mechanism to use in instituting proceedings.[35] All actions taken by the agency were based on policy considerations concerning the FSLIC's insurance fund or federal oversight of the thrift industry. In countering Gaubert's reliance on language from Dalehite, which seemed to exclude from the discretionary function exception decisions made at the operational rather than the planning level, the Court reiterated that there was no suggestion in that case that decisions made at the operational level could not also be based on policy.[36]

Justice Scalia, in his concurrence, sought to clarify the scope of the discretionary function exception by announcing that

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[34] Id.

[35] Id.

[36] Id. at 1275. The Court also rebutted Gaubert's assertion that discretionary acts only occur in formulating broad policies and do not include negligent acts occurring in the course of daily activities:

> If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable. This is not the rule of our cases.

Id. at 1279

the level at which a decision is made and the subject matter are relevant:

> In my view a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

Id. at 1280. Thus, Justice Scalia has chosen to revisit the planning versus operational dichotomy which the other members of the court appear to be eschewing. He can imagine, for example, a situation in which a low-level federal official authorized to manage a bank hires a consultant using ordinary standards of business judgment without considering governmental policy matters in the process. Here, the hiring decision would not be protected even though there is some element of choice involved if he was not authorized to consider matters of policy.[37] On the other hand, if the matter involved policy discretion, and he was authorized to exercise that discretion, he would be protected, even if that discretion had been exercised negligently.[38] Justice Scalia admits that in these cases it is much easier for him to find an act discretionary when it is performed by a high

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[37]Id. at 1291.

[38]Id.

ranking government official. There is a presumption that all regulations involve policy judgments that must not be interfered with. Justice Scalia believes that there is a similar presumption that:

> decisions reserved to policy-making levels involve such judgments--and the higher the policy-making level, the stronger the presumption.

Id. at 1281. In the last analysis, Scalia maintains that the decision to take over the bank was discretionary, and in so doing, the regulators established guidelines for exercising their discretion which also fell within the discretionary function exception.[39]

Since Gaubert there have been several lower court decisions interpreting the discretionary function, among which figure the following:

The United States Court of Appeals for the District of Columbia, in March 1992, examined the issue of discretionary functions with respect to military operations in Industria Panificadora.[40] Panamanian businesses alleged the property

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[39]Id.

[40]Industria Panificadora, S.A. v. United States, 957 F.2d 886 (D.C. Cir. 1992).

damage from looting in the wake of the invasion of Panama by U.S. forces resulted from the negligence of U.S. officials who failed to provide adequate police protection during and after the invasion. The district court dismissed the action, holding that the acts complained of fell within the discretionary function exception to the FTCA.[41]

Relying on Gaubert, the appellate court opined that section 2680(a) of the FTCA shields governmental decisions from liability if they are grounded in "considerations of social, economic or political policy, whether at the 'planning" or 'operational' level."[42] These decisions concerned the allocation of military and law enforcement resources, and were therefore within the exception.[43] Although the Panamanians contended that the United States was under a mandatory duty to provide police protection imposed by Article 43 of the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, that article prescribed no specific course to be followed; hence, the actions taken were discretionary. The discretionary function applies where statutes impose broad duties and do not circumscribe discretion in

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[41]Id. at 886. The court also argued that the action presented a nonjusticiable political question. Id.

[42]Id. at 887.

[43]Id.

fulfilling those duties.[44]

The United States District Court for the Northern District of California addressed a situation similar to that in Industria Panificadora in Patel[45] arising from the loss of Patel's rental property through fire while Drug Enforcement Agency (DEA) served a search warrant on his tenants, suspected drug dealers. Upon entering the residence, law enforcement agents were met with gunfire. A gun battle ensued in which DEA agents used various pyrotechnic explosive devices which set the house afire. Patel alleged in his complaint that the DEA negligently caused the complete destruction of his property through fire, and as a direct and proximate result of this negligence, Patel suffered emotional distress.[46] The government moved to dismiss for want of subject matter jurisdiction, contending that the conduct of which Patel complained was protected from suit by the discretionary function exception.

Invoking Gaubert, the district court articulated two basic elements to the exception:

> First, the exception applies to acts that involve an element of judgment or choice. (citation omitted) Second, the

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[44]Id.

[45]Patel v. United States, 806 F.Supp. 873 (N.D.Cal. 1992).

[46]Id. at 874-75.

challenged conduct must be of the type that the discretionary function exception was designed to shield. (citation omitted)

Id. at 875. Emphasizing that under Gaubert the exception shields actions "based on considerations of public policy, and grounded in social, economic and political policy," the court counselled that the exception depends solely on the nature of the conduct, not on the status of the actors, thereby rejecting any analysis based on whether the activity was undertaken at the operational or planning levels of government.[47] Some of the decisions taken by the DEA officials in serving the search warrant were not based on the aforementioned considerations:

> [T]he officers' decisions to use flammable tear gas projectiles (instead of non-flammable projectiles) in an amount sufficient to completely destroy the structure at the scene were not based on considerations rooted in social, economic or political policy ....

Id. at 878. Hence, the DEA's conduct was not protected by the discretionary function exception to the FTCA.

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[47] Id.

Conversely, in Reeves[48] the United States District Court for the Northern District of Georgia found that it was without jurisdiction to hear Reeves' suit claiming that the defendants negligently failed to investigate the reports of illegal activities and negligently failed to provide the plaintiff with protection once he came forward with information regarding the illegal manufacture of explosives. Because of this failure to pursue the investigation and provide protection, the plaintiff claimed to have suffered emotional injury. The court based its dismissal for lack of jurisdiction on the discretionary function exception recalling that: "[f]ederal courts have frequently found claims arising from decisions on whether to conduct law enforcement investigations to be barred by the discretionary function exception."[49] For purposes of comparison, it is notable that the plaintiff sued the special agent in the field who was apparently responsible for the decision--someone who was

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[48]Reeves v. United States of America, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, and Don Rogers, 1992 WL 383343 (N.D.GA.).

[49]Id. at *2. Citing Kelly v. United States, 924 F.2d 355 (1st Cir. 1992):

> [A] Drug Enforcement Agency agent brought an action against his supervisors, alleging defamation and failure to investigate. The court held that the discretionary function exception to the FTCA barred the suit, stating that "... decisions to investigate, or not, are at the core of law enforcement activity [and] involve precisely the kind of policy-rooted decision-making that section 2680(a) was designed to safeguard." Id. at 362.

Id.

by no means responsible for policy decisions.[50]

Another twist put on the discretionary function exception post-Gaubert arises from a suit brought by a worker against the United States and its subcontractor after he was injured in a fall.[51] Doud, a carpenter, was working for Black River, the general contractor for a large construction project funded by the United States for rebuilding portions of Fort Drum in Watertown, New York. The makeshift scaffold on which he was standing collapsed inflicting permanent injury upon Doud. The issue the court entertained was whether the United States' delegation of its responsibility for safety to its general contractor was a discretionary function.[52] Following Gaubert, the court

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[50]Indeed, in reiterating that it is the conduct, not the status of the actor, the court imparts:

> The discretionary function exception covers governmental decisions and actions grounded on considerations of social and economic or political policy. See United States v. GAUBERT, --- U.S. ----, ---- - ----, 111 S.Ct. 1267, 1273-1275, 113 L.Ed.2d 335 (1991). The exception covers acts that "involved an element of judgment or choice," or the "permissible exercise of policy judgment." Berkovitz v. United States, 486 U.S. 531, 536-37, 108 S.Ct. 1954, 1958-59, 100 L.Ed.2d 531 (1988). Moreover, it is the "nature and conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. (footnote omitted) United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984).

Id.

[51]Doud v. U.S., 797 F.Supp. 138 (ND.N.Y. 1992).

[52]Id. at 144.

reaffirmed that discretionary conduct is not confined to the policy or planning level. There are some obviously discretionary acts performed by a government agent within the scope of his employment that are not based on the purposes which a particular regulatory scheme seeks to further. As an illustration of a discretionary act not embraced by the discretionary function exception, the court offered the example of an official in an automobile who negligently collides with another vehicle while performing his duties. Although driving requires the exercise of discretion, this discretion is plainly not the type grounded in regulatory policy.[53] The government had contractually delegated its safety responsibility to the general contractor pursuant to the Federal Acquisition Regulations (FARs); the court therefore concluded that, even if the government had been negligent in implementing procedures to ensure the general contractor's compliance with safety the discretionary function exception nevertheless obtained.[54]

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[53]Id. at 146, footnote 3.

[54]Id. The District Court for the Northern District of New York clarified that:

> [t]he FARs provide that the Government should delegate authority for safety to the contractor and retain for itself only an oversight obligation. In carrying out this oversight function, the FAR provides no set procedure but rather leaves such decisions to the discretion of the employees responsible for such oversight.

Id. at 146, footnote 3. Accord, Fridge Const. v. Fed. Emergency Mgt. Agency, 797 F.Supp. 1321 (S.D. Miss. 1991). Litigation arose from federal, state, and local governmental efforts to repair damage in the aftermath of Hurricane Elena in 1985. Fridge, the contractor, sought to recover the additional cost of

The Eleventh Circuit, however, pierced the discretionary function exception's protective shield in Phillips, a case strikingly similar to Doud.[55] Here, too, a contractor's employee fell from a scaffold at a construction site on an Air Force base. The Army Corps of Engineers (Corps), although it was not actively engaged in the construction work, had responsibility for the assurance of safety and accident prevention. The United States argued that it had delegated its safety responsibilities to its general contractors and was shielded from liability under the discretionary function exception.[56] Affirming the district court's rejection of both arguments, the appellate court distinguished instances in which Gaubert would afford the United States protection from the case at bar. Specifically, it was noted that since there were directives in the Army Corps of Engineers' Safety Manual by which the Corps had to abide there

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debris removal it incurred as a result of its contract with the United States by bringing an action against the Federal Emergency Management Agency (FEMA) for negligently misrepresenting the accuracy of debris estimates and then permitting their publication. Citing as authority Gaubert, the court opined that the federal government agent's decision to permit the further release of estimates was protected by the discretionary function exception: it "evidenced the agencies policy of providing equal access to the estimates and no statute or regulation prohibited the publication of the estimates." Id. at 1344.

[55]Phillips v. United States, 791 F.Supp. 1307 (E.D.Tenn. 1992).

[56]Id. at 1075.

was no room for discretion.[57] Phillips' injuries resulted from the Army Corps' actual negligence in discharging its mandatory safety responsibilities, all of which it had not delegated to independent contractors: the Corps assumed "substantial, mandatory responsibilities for insuring a safe working environment and for insuring compliance with the Army Corps's Safety Manual."[58] Because there was mandatory responsibility, there was no room for discretion or a policy choice.[59]

Heller,[60] a case dealing specifically with the discretionary function exception in a medical context, concerned the Federal Aviation Administration's (FAA) refusal to issue a professional pilot a first-class medical certificate. Heller argued that the government was negligent in failing to consider an electrocardiogram (EKG) in his file. Additionally, he

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[57]Id. Explicating Gaubert, the court acknowledged:

> Because resources are limited, it is axiomatic that discretion must be used in allocating available resources. The need for expedition versus the need for safety arises several times a day for many federal employees. Nevertheless, this does not mean that a federal employee's every choice is a policy judgment shielded from liability through the operation of the discretionary function exception.... [T]he government cannot expect Army Corps inspectors to make policy judgments concerning whether or not they should abide by the directives in the Corps's Safety Manual every day they go to work.

[58]Id. at 1076.

[59]Id.

[60]Heller v. United States, 803 F.2d 1558 (11th Cir. 1986).

asserted that the FAA was negligent in its application of the medical standard in 14 C.F.R. section 67.13(e)(1)(i) (1986).[61] As a professional pilot with a commercial airline, Heller held a first-class medical certificate. In 1972, he suffered chest discomfort which impelled him to undergo medical testing. Based on those tests, including an EKG, an examining physician diagnosed Heller as having a myocardial infarction. Pursuant to 14 C.F.R. section 61.53 (1986), the physician notified the Aviation Medical Examiners (AME) of his condition and provided the AME with a medical report, as a result of which, Heller's medical certificate was withdrawn. He applied for recertification five times between January, 1973 and August, 1976. Heller then petitioned for an exemption from 14 C.F.R. section 67.13(e)(1)(i) (1986) which the Federal Air Surgeon denied. Finally, in 1980 the Federal Air Surgeon found Heller qualified for the certificate. Heller subsequently filed an FTCA suit seeking damages for the FAA's negligent denial of the medical certificate, alleging that such denial was the result of "negligent investigation, data collection, data production and diagnostic procedures and activities of the agents and employees of the Federal Aviation Administration." (internal quotations omitted)[62] The district court dismissed the complaint because it fell under the protection of the discretionary function exception:

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[61] Id. at 1559.

[62] Id. at 1561.

> [ ] Medical licensing authority of the FAA is clearly a role where the government is acting "as regulator of the conduct of private individuals." [ ] Furthermore, a decision to not except such medical determinations by the surgeon would be to place these determinations in constant jeopardy to potential law suits. [ ] [T]he individual acts and decisions in issuing and suspending, or reissuing, a medical certificate are discretionary conducts (sic) of a policy and decision making nature intended to be excepted by section 2680(a).

Id. at 1561-62. The Eleventh Circuit affirmed, stating that the FAA's allegedly negligent failure to consider the 1968 EKG was a discretionary function and therefore immune from suit.[63]

Heller's second contention was that the denial of his certificate was based solely on a diagnosis of myocardial infarction. As such, this finding was simply a medical judgment not implicating any policy-making concerns; therefore, the FAA's

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[63]Id. The court quoted from Payton, supra, as precedent for its conclusion:

> In fulfilling this task, the Board must exercise its judgment by determining the materiality of certain studies and documents and the propriety of relying therecn in reaching its final assessment. Further, the manner and degree of consideration with which the Board examines these materials is inextricably tied to its ultimate decision.

Id. Consequently, any negligent failure to consider the EKG in deciding to withhold the medical certificate fell within the discretionary exception.

negligent application of this medical history was not within the scope of the exception.[64] The appellate court also rejected this assertion, concluding that a determination that an applicant has such a medical history involves not only medical judgment, "but also necessarily implicates policy concerns."[65] Reading the particular standard in the overall statutory and regulatory scheme, the court held that the FAA determination pursuant to section 67.13(e)(1)(i) necessarily involved safety considerations since the primary purpose of the Federal Aviation Act was to promote air safety. The FAA, in applying medical standards, made its decisions in a conservative manner in order to avoid safety risks.[66]

In a different vein, a Tenth Circuit decision in 1987 upheld a lower court's holding that the discretionary function exception immunized the United States from liability even if its physicians and industrial hygienists negligently failed to warn miners of dangers associated with radiation exposure.[67] In Barnson, the Atomic Energy Commission (AEC) made the decision not to warn miners of the dangers of radiation exposure based on the need for secrecy and national security. Furthermore, the physicians and

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[64]Id.

[65]Id.

[66]Id.

[67]Barnson v. U.S., 816 F.2d 549 (10th Cir. 1987), cert. denied, 108 S.Ct. 229 (1987).

hygienists studying the miners never endeavored to care for the miners. In following the secrecy policy, these participants were protected whether or not they were responsible for creating the policy or just complying with it.[68]

Barnson, notwithstanding, the United States District Court for the District of Columbia in Orlikow[69] upheld jurisdiction in a suit sounding in negligence filed under the FTCA for the Central Intelligence Agency's (CIA) allegedly negligent funding of human experimentation and medical malpractice. Plaintiffs asserted that the CIA negligently supervised and controlled employees who were funding a covert research project designed to investigate chemical and biological warfare. Many of the projects involved the use of Lysergic Acid Diethylamide (LSD) and other drugs which were administered to unwitting human subjects.[70] The court found that where an agency has negligently selected incompetent contractors or employees, in turn supervising them in a careless manner, that agency has committed "acts of negligence pure and simple."[71] To hold otherwise would extend the protection of the discretionary

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[68]Id. at 553.

[69]Orlikow v. U.S., 682 f.Supp. 77 (D.D.C. 1988).

[70]In one of the secret experiments LSD was put in liquor which was served to a group of scientists from the CIA and Army Special Operations. One of the subjects fell or jumped from a hotel window after ingesting the substance. Id. at 80, footnote 3.

[71]Id. at 82.

function exception beyond what Congress had intended. The court stressed that negligent selection and supervision are unquestionably areas for the judiciary. Hence, the issue of whether the government delegated funding authority to persons unfit to exercise it was left to the trial court to resolve.[72]

In another decision focusing on the dichotomy between unwise policies and simple medical negligence, the wife and children of a mentally disabled veteran brought suit against the United States after he committed suicide claiming that the Veterans Administration hospital in San Juan negligently treated him.[73] Rivera, the patient, had been hospitalized; following his release, he revealed to his wife that he wanted to die. He thereafter, sought readmission to the hospital for treatment. The hospital refused his request for admission; after attending outpatient meetings, he killed himself. The court sided with the family in contending that their claim against the government was simple medical malpractice falling outside the discretionary function exception.[74] The court, therefore, reversed the lower

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[72]Id.

[73]Collazo v. U.S., 850 F.2d 1 (1st Cir. 1988).

[74]Id. Citing Professor Kenneth Davis, the court proclaimed:

> The discretionary function exception is limited to the exercise of governmental discretion and does not apply to the exercise of nongovernmental discretion such as professional or occupational discretion. The driver of a mail truck makes many discretionary decisions but they are not within the exception because they involve driving discretion, not governmental discretion. The physician at

court's finding that the decision to release Rivera and not to readmit him rested upon administrative policy grounds. The plaintiffs were alleging improper medical, not improper policy decisions; consequently, the discretionary function exception protecting governmental--not professional--decision-making did not apply.[75]

What of the failure to establish policy? What if that failure is arguably negligent? Keir highlights the difference between failure to adopt and implement policy and failure to follow established policy for purposes of the discretionary function exception.[76] Little Karen Keir and her mother brought suit against the United States for injuries she sustained when an Army optometrist failed to refer her to an ophthalmologist upon perceiving that she suffered from strabismus. As a result of the optometrist's refusal[77] to follow guidelines calling for optometrists to do so whenever patients afflicted with strabismus presented themselves, Karen was never seen by a specialist who

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> the veterans' hospital exercises professional discretion in deciding whether or not to operate; ... he combined professional discretion with governmental discretion when he decides that budgetary restrictions require nonuse of an especially expensive treatment in absence of specified conditions.

Id. at 2.

[75]Id. at 3.

[76]Keir v. U.S., 853 F.2d 298 (6th Cir. 1988)

[77]Dr. Channing, the optometrist, had voiced disagreement with the policy and attempted to have it abolished. Id. at 403.

would have discovered that she had a tumor in her left eye. When the tumor was finally discovered and treated, doctors were unable to prevent a serious deterioration of her sight in that eye. Plaintiffs also alleged that the optometrist's care fell below the standard of care requiring that patients like Karen undergo a dilated exam with an indirect ophthalmoscope, which procedure the optometrist did not employ.[78]

In addressing the plaintiffs' apparent misunderstanding of the lower court's ruling, the Sixth Circuit underscored that to the extent the Army failed to enact internal safeguards to ensure that this type of patient be referred to the appropriate specialist, the discretionary function exception obtained.[79] However, the optometrist's failure to comply with procedures already in place did not implicate that exception from liability.[80]

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[78]Id. at 404.

[79]Id. at 409.

[80]Id. Accord, Daigle v. Shell Oil Co., 972 F.2d 157 (10th Cir. 1992):

> If a specific and mandatory statute, regulation or policy is applicable, "there is no discretion ... for the discretionary function exception to protect" and the Government's action in connection therewith will be subject to an FTCA claim. Berkovitz, 486 U.S. at 536, 108 S.Ct. at 1959. If, on the other hand, the Government's conduct is not controlled by specific directives, we must proceed to the second prong of the analysis and determine whether the discretion involved "is of the kind that the discretionary function was designed to shield." Id. at 537. [ ] Only decisions that are " susceptible to (sic) policy analysis" are protected by the discretionary function

There are many areas in which the judiciary is called upon to rule on whether acts of government employees in a medical context are cloaked in immunity from suit by the discretionary function exception the FTCA. As is obvious from the above discussion of case law interpreting the limits of this legislated protection, the courts' task in distinguishing between allegedly negligent acts which are the product of authorized discretion and those that merely involve the faulty execution of duties is often not an easy one. Mid-level government administrators--like commanding officers of military hospitals, for example, often take decisions which lead to untoward and unintended results for particular patients. These patients, believing themselves to have fallen victim to the negligence of their treating physician, frequently bring suit under the FTCA. The issue, in light of Gaubert and its progeny, is doubtless whether the acts or omissions complained of are the ultimate manifestations of deliberate decisions based on policy.[81] The choices made by the

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exception. Gaubert, --- U.S. at ---, 111 S.Ct. at 1275.

Id. at 1538. Accord, Leone v. U.S., 690 F.Supp. 1182 (E.D.N.Y. 1988):

> What is involved here is an alleged failure to apply clearly articulated medical standards in the context of a physical examination. During that examination, the AMEs, like the doctors in Hendry, the INS agents in Caban, and the Coast Guard in Eklof, made no "policy" decisions. Accordingly, the discretionary function exception is inapplicable. (footnote omitted)

Id. at 1188.

[81]See, Collazo, supra, and footnote 74.

administrators, therefore, must be susceptible of public policy consideration to withstand judicial review.[82]

The federal health care system as always been subject to the whims of budgetary policy; this remains a sober fact of administrative reality. Granted the prevailing political climate advocating fiscal frugality, it is not surprising that President Clinton has recently proposed to Congress a plan for attacking the inexorable growth of deficit spending that involves considerable funding cuts--especially for defense. These fiscal constraints, if enacted by Congress, will necessarily impinge upon the military's provision of health care services. In the face of scarce and dwindling resources, federal officials at most, if not all, levels of government will find themselves hampered in the execution of their office by austerity measures exacting sacrifice. Unforeseen consequences of cost containment will follow. The implementation of policies emanating from the highest echelons of the federal bureaucracy will inevitably fit squarely within the framework of the discretionary analysis regardless of the adverse ramifications for patient care. More than ever, medical administrators such as the commanding officers of military hospitals will now be confronted with the difficult task of allocating their assets and resources in an efficient manner as they strive to fulfill mission requirements. Many of their mandates are sure to entail litigation. At the bottom of

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[82]Gaubert, supra, at 1279.

the pyramid are the professional health care providers burdened with actually delivering these salutary services by employing the means at their disposal.

Hospital administrators routinely ponder logistical questions of staffing, availability of specialized services, the provision of primary care or even minimum services in remote locations, and the level of inpatient and outpatient care to be afforded in a particular community.[83] Peer review committees, hardly immune from the pressures of the fisc, must foment the optimum standards within their community commensurate with the realities of the situation. Utilization review pronouncements are not formulated in a vacuum either. Practitioners at all levels will find themselves directly or indirectly influenced in the course of treatment by management decisions whose primary impetus is fiscal restraint. Decisions affecting the quality of medical care made at all levels will, in effect, turn on the scarcity of health care resources. One can envision numerous situations in which governmental discretion plays a part. The commanding officer's determination regarding physician placement in the emergency room, although made at the operational level by a relatively low-ranking government official, invokes matters of

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[83]CF., Industria Panificadora, and Reeves, supra. Query whether these duties are not analogous to those of law enforcement officials.

policy.[84] Likewise, a decision by the commanding officer, or someone else delegated authority, to limit diagnostic tests offered to patients falls within the purview of discretion. The advisability of stocking costly medications in the pharmacy and the procurement of prohibitively expensive equipment both rise to the level of discretion. Similarly, a physician's choice to forgo state-of-the-art laboratory tests would merit protection from liability within the analytical framework of Gaubert if it were driven by departmental directives disallowing that exorbitant laboratory procedures under the particular circumstances[85]. Staffing, the granting of privileges, quality assurance, utilization review, ancillary services, the procurement of equipment, the provision of routine and specialized services, and cost-containment measures in general remain among the many aspects of daily hospital operation which, at the very least, tangentially influence the level and quality of care provided. A dearth of specialists, for example, might impel an administrator to grant invasive- procedure privileges to an HIV-positive surgeon who then infects a patient. Budgetary constraints could induce an administrator to contract emergency room services out to an independent contractor under terms providing for reduced staffing; barriers to tort liability under state and federal law raised by independent contractor

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[84]See, Berkovitz, Industria Panificadora, Collazo, and Reeves, supra.

[85]See, Berkovitz, supra.

relationships, notwithstanding, jurisdiction and liability have been predicated on negligently made decisions delegating responsibility.[86] Training practices concerning physicians and non-physicians also enter the discretionary function arena--the training requisite to a hospital corpsman's performance of a particular routine duty like serving in an ambulance, for example. Many of these issues devolve upon the commanding officer or hospital administrator for resolution; some percolate down to the level of health care providers themselves, whether physicians, nurses, hospital attendants, or corpsmen.

The aforementioned examples suggest that in many instances medical misadventures ostensibly occasioned by malpractice, i.e., simple negligence on the part of the provider, could in fact be the result of the type of discretion whose exercise remains immune from suit under the FTCA. The crux of the issue centers on whether the impetus for the perceived shortfall in the prescribed course of treatment was actually the result of policy or merely a consequence of inattention to the prevailing standard of care.[87]

That the discretionary function exception is necessary to the efficient functioning of the federal government cannot be

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[86]See, Phillips, supra.

[87]See, Gaubert, supra, at 1280, Orlikow, supra, at 82, and footnotes 36 and 74.

gainsaid. Taking a somewhat more restrictive view of the utility and optimum scope of the exception, however, Professor Krent, in a 1991 article, points out that the discretionary function serves principally to preserve the allocation of powers among the three branches of government.[88] Without this protection, government operations would grind to a halt. Professor Krent argues that the greater the need to preserve vigorous decision making and policy making by agency officials, the greater the case for application of the discretionary function exception."[89] He sees a delicate balance between the deterrence function encourage by the government's waiver of immunity and the necessity of protecting government agencies from judicial intrusion.[90] With every invocation of this exception he finds a corresponding diminution of deterrence. The purpose of tort liability under the FTCA is to force government agencies to internalize the costs of accidents and therefore provide incentive to avoid negligent conduct.[91] This deterrent incentive arises from tort liability, the administrative and the political process. Professor Krent cautions, however, that to the extent this protection becomes more certain, thereby allowing officials to predict when their actions will be shielded, the deterrent effect is correspondingly

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[88]Krent, Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability In Tort, 38 UCLA L. Rev. 871, 885 (1991).

[89]Id. at 885.

[90]Id.

[91]Id. at 887.

lessened.[92] Along with the benefits conferred by waiver of tort liability, such as deterrence and the compensation of innocent victims of negligence, come several detriments. Plenary judicial review over every congressional act would render the judiciary the "final arbiter of 'good' government" instead of leaving that final determination to the ballot box.[93] Furthermore, pervasive judicial scrutiny of Congress' every move would frustrate policy making--even at the agency level, subject the federal agencies to inconsistent standards imposed by various courts, and furnish agencies with a powerful incentive to conform their conduct to what they perceive to be the judiciaries' preferences.[94]

Professor Krent distills the issue to one of drawing a line between agency actions that represent public policy, therefore warranting deference, and those that do not.[95] The discretionary function exception, according to Professor Krent, should only protect agency policy making, not nondeliberative or

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[92]Id.

[93]Id. at 895.

[94]Id. at 895-897.

[95]Id. at 898. Krent reiterates that:

> [t]he discretionary function exception should insulate all agency actions that, like congressional enactments themselves, reflect national policy. Plainly, all agency regulations and rules should be protected because, much like legislation itself, they are responsive in some way to the democratic process. But it is not as clear which other agency actions similarly reflect national policy and, therefore, merit protection under the discretionary function exception. (footnote omitted)

ad hoc actions."[96] He is especially wary of those made by a single official in response to a particular circumstance preferring instead, those arrived at after lengthy discussion among various functionaries.[97]

In formulating a method of analysis that would protect the administrative process, Professor Krent has proposed the "process approach" which he maintains would "ease the courts' formidable task of applying the discretionary function exception."[98] This approach combines several elements of tests previously applied by courts. Actions taken at the planning stage would be exempted from judicial review. Courts would have to scrutinize contested

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[96]Id. Krent underscores the advisability of protecting well-thought-out agency decisions rather than those taken by a specific agency official in a particular situation:

> Agency policies are generally formulated only after considerable debate and input from different levels within the agency itself.... Agency policies, therefore, likely reflect the political judgment or expertise which presumably prompted Congress initially to delegate authority to the agency.
>
> In contrast, nondeliberative actions, such as the reaction of an employee or official to a particular situation, may not be followed if similar situations are in the future. Such actions rarely stem from internal agency deliberations, usually embody no more than one employee's judgment and therefore unlikely reflect the agency's mission to act as Congress' partner in fashioning national policy. (footnote omitted)

Id. at 898-99.

[97]See, footnote 90.

[98]Id. at 906.

agency action to determine whether it was spawned by a deliberative process giving rise to a decision likely to be followed in the future or from a "case specific judgment of an individual employee." [99] This process approach is redolent of the planning versus operational dichotomy consistent with Dalehite but not consonant with Gaubert, the latter not having been decided by the Supreme Court at the time of the publication of Professor Krent's article.

As noted previously, the Gaubert decision has virtually discarded the planning/operational dichotomy proclaiming, instead, that even decisions made at an operational level could be grounded in policy thereby enabling them to be embraced by the discretionary function exception.[100] The key under Gaubert and Berkovitz seems to be whether the official taking the decision--

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[99]Id. at 906.

[100]Barry R. Goodman stresses the Court's disavowal of the planning oriented analysis:

> The Gaubert Court dismissed the planning/operational dichotomy of Dalehite as "merely [a] description of the level at which the challenged conduct occurred." indicating that decisions made at an operational level could also be base on policy and could thus also fall within the exception. (footnote omitted) The Court further noted that the distinction between planning and operational activities was not supported by Indian towing, in which liability was predicated on the lack of any grant of discretion rather than the fact that the actions were conducted at the operational level. (footnote omitted)

Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act, 26 Ga. L. Rev. 837, 843 (1992).

at whatever level--was authorized to do so and whether the decision taken was rooted in policy considerations.[101] Hence, it appears possible for an official to violate a specific federally mandated procedure, if authorized to exercise his judgment in that regard, and still come within the ambit of the discretionary function exception. Conversely, negligent actions taken without regard to policy are deserving of no liability protection.[102]

The doctrine of discretionary immunity first interpreted in

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[101]Goodman contends that in answering the discretionary function dilemma, courts could:

> "... look to see not only whether the employee's decision or judgments are "grounded in policy," pursuant to Gaubert, but also whether the employee is authorized to make such decisions. (footnote omitted) Since the Supreme Court has effectively eliminated the distinction between planning and operational functions, (footnote omitted) deciding whether acts of discretion are authorized becomes especially important. (footnote omitted) Policy decisions, even on an operation level, are protected by the discretionary function exception. (footnote omitted). Not all government employees, however, are authorized to make such policy determinations. The persons implementing the vaccination approval program in Berkovitz, for example, were not authorized to make policy determinations as to whether those procedures were the most cost efficient or safe methods possible. Authorization is, in other words, another way of checking to see that the first test in Berkovitz (footnote omitted) is met: Is there room for policy or discretionary judgments? If there is not, then any actions deviating from agency directives should be actionable in tort.

Id. at 847-48.

[102]Contrast Orlikow with Barnson, and Heller, supra.

Dalehite has metamorphosed from one professing a distinction between actions taken at planning or operational stages to one forswearing that artificial distinction in favor of an examination of the nature of the decision itself in order to reveal whether its genesis was in policy. In arriving at a conclusion under this analysis, courts must review the applicable regulations to discover whether the officials involved were following established policy or whether they were authorized to act in the absence of policy. Indeed, the absence of policy does not inevitably portend liability:[103] it falls squarely within an official's discretion to refrain from formulating policy in any given area. Gaubert has expanded the application of the discretionary function exception in two very important ways: first, it allows officials to act, unfettered by whether their actions are categorized as planning or operational--the only constraint being that they reflect policy considerations; second, Gaubert extends the power to take policy-rooted decisions throughout all the ranks bounded only by authority limitations.[104] As a result, many unintended consequences of actions taken even at the lowest levels of health care provision could be shielded from liability, if they were the products of deliberative processes reflecting governmental policy effectuated by persons authorized to so do. Administrators, peer review organizations, and mid- and low-level officials, as well as

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[103]Keir, supra, at 409.

[104]Gaubert, supra, at 1280.

government attorneys must now lend more attention than ever to the factors and circumstances surrounding allegedly tortious conduct. Administrators--and even providers themselves--as far as practicable, should recognize the heightened breadth of protection from potential liability which Gaubert has infused into the decision-making process and the concomitant responsibility to produce and maintain supporting documentation and other evidence of the deliberative process underlying treatment decisions and authority to formulate and execute discretionary policies related to the delivery of health care. Under the discretionary function analysis set forth in Gaubert federal agency officials possess greater freedom in exercising their judgment and executing their manifold duties.